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No. 87-502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARCO OIL AND GAS COMPANY, DIVISION OF ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

WILLISTON BASIN INTERSTATE PIPELINE COMPANY AND THE FEDERAL ENERGY REGULATORY COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF OF PETITIONER TO BRIEF IN RESPONSE OF WILLISTON BASIN INTERSTATE PIPELINE COMPANY

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Pursuant to Rule 22.5, Petitioner ARCO Oil and Gas Company, Division of Atlantic Richfield Company ("ARCO") replies to the Brief in Response to ARCO's Petition for a Writ of Certiorari of Respondent Williston Basin Interstate Pipeline Company ("Williston") [1] which is dated October 19, 1987.[2]

[1] Williston is a part of the MDU Resources Group, Inc. group of companies and purchases gas from ARCO under contracts originally executed by Montana-Dakota Utilities Company. Effective as of January 1, 1985, MDU Resources Group, Inc. assigned these contracts to Williston.

[2] By letter dated October 20, 1987, the Solicitor General requested an extension of time to and including November 28, 1987, within which to file Respondent Federal Energy Regulatory Commission's response to ARCO's petition.

1. Williston states that this Court should grant ARCO's Petition. Brief in Response at 1, 2, 17. Williston also states that the Court of Appeals erred in its analysis of the legislative history of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3301-3432. *Id.* at 3. Because Williston's Brief contains no other statements addressing jurisdictional questions or the questions of statutory interpretation presented by ARCO's Petition, ARCO assumes that Williston supports ARCO's arguments on those questions, as contained in ARCO's Petition. Thus, for the reasons set forth in ARCO's Petition (Petition at 10-25) and in view of Williston's support of the granting of that Petition, this Court should grant ARCO's Petition and reverse the Court of Appeals' holding that it lacked jurisdiction to consider Williston's petition for review of the orders of Respondent Federal Energy Regulatory Commission ("Commission").

2. Williston states that this Court should grant ARCO's Petition "because of the important issues this case presents for the administration of the NGPA." Brief in Response at 2. Williston, however, does not properly identify any issues other than those stated by ARCO. Instead, examination of Williston's Brief shows that Williston's characterizations of the Commission's orders and its arguments address its positions on the merits which were not reached by the Court of Appeals. See Brief in Response at 5-12, 14-16.

Williston argues the merits of its positions in spite of its necessary recognition that the holding below was a dismissal of its petition for review for lack of jurisdiction (Brief in Response at 2), and that "the Court of Appeals did not address Williston's arguments." *Id.* at 12. Nevertheless, Williston apparently believes this Court may or should go beyond the question of the Court of Appeals' jurisdiction presented by the Petition; review all substantive issues on the merits; and then hold the

Commission's orders were "arbitrary and capricious." Brief in Response at 12-16.

3. All of Williston's arguments on the merits were decided properly and adversely to it by the Commission. See App. 15a-19a and 26a-28a. All of Williston's arguments, including those related to the record, the DOE Reports, the GAO Report, and the Commission's findings and conclusions, also were fully answered on the merits before the Court of Appeals by the Commission and by ARCO. Assuming this Court grants the Petition and reverses the Court of Appeals' holding on the question of its jurisdiction, then these arguments of Williston, the Commission, and ARCO may be appropriately considered on the merits. Obviously, they are not ripe for argument, consideration, and decision before this Court.

4. Williston is in error in seeking to have this Court address the matters presented in Williston's Brief without the benefit of an opinion from the Court of Appeals. ARCO submits that this effort is wholly inappropriate. This Court ordinarily does not consider matters not decided below. See, *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 147 n.2 (1970). As a result, instead of addressing the merits of matters argued in Williston's Brief, this Court should grant ARCO's Petition, reverse the holding of the Court of Appeals on the question of its jurisdiction, and remand this case to the Court of Appeals for such proceedings as that court then finds appropriate in light of this Court's opinion. *See, e.g., Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 549 (1978).

CONCLUSION

For the reasons stated in ARCO's Petition, and in light of Williston's concurrence, this Court should grant ARCO's Petition, consider the "Questions Presented" by ARCO (see Petition at (i)), and reverse the Court of Appeals on those questions.

Respectfully submitted.

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